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In the Supreme Court of the United States

OCTOBER TERM, 1980

MATTHEW CIANCIULLI, JR. AND JOSEPH R. RICCA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding expert testimony on a matter within the common knowledge of the jury.

2. Whether the district court erred in refusing to strike a juror who had been approached by a trial spectator, after a hearing determined that no prejudice resulted from the incident.

3. Whether the government improperly commented on petitioners' failure to testify.

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The judgment order of the court of appeals (Pet. App. A87–A88) is reported at 624 F.2d 1091 (table). The opinion of the district court (Pet. App. A1–A85) is reported at 482 F. Supp. 585.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1980. A petition for rehearing was denied on July 29, 1980 (Pet. App. A89). Mr. Justice Brennan extended the time for filing the petition for a writ of certiorari to October 15, 1980 (Pet. App. A92), and the petition was filed on that date. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners, Matthew Cianciulli and Joseph Ricca, were convicted of conspiracy to violate the rights and privileges of citizens in violation of 18 U.S.C. 241, conspiracy to provide false voter registration information in violation of 42 U.S.C. 1973(i)(c), and a number of counts of aiding and abetting the false registration of voters in violation of 42 U.S.C. 1973(i)(c).[1] Cianciulli was sentenced to three years' imprisonment, and Ricca was sentenced to imprisonment for one year and one day. The court of appeals affirmed by judgment order (Pet. App. A87–A88).

[1] Cianciulli was convicted on nine counts of aiding and abetting the false registration of voters; Ricca was convicted on three counts of aiding and abetting the false registration of voters in violation of 42 U.S.C. 1973 (i) (c). Cianciulli was acquitted on 13 voter registration and mail fraud counts; Ricca was acquitted on two voter registration counts (Pet. App. A4–A5 n.5).

Briefly, the evidence at trial established that petitioners conspired to encourage false voter registrations in Philadelphia, Pennsylvania, between March 1974 and September 1976. In the course of the conspiracy, 55 individuals registered to vote in the First Ward of Philadelphia, each giving as his residence one of nine addresses (see, *e.g.*, Pet. App. A23–A26 nn. 16–17, A29–A30 n.20, A32–A33 n.22, A64 n.34). One of the addresses was Cianciulli's official residence, which also housed a grocery store owned by him; another was owned by his mother. Ricca listed the grocery store address as his residence (Pet. App. A76–A77). Contrary to their representations, many of the registrants did not live at those addresses or anywhere within the district (see Pet. App. A25–A26 n.17). Petitioners also accompanied several registrants to the registration sites and coached them. Several voter registration forms mailed by alleged residents were, in fact, partially prepared by Cianciulli (Pet. App. A24–A25 n.16), who was at the time a Democratic committeeman in the First Ward, Thirteenth Division of Philadelphia; in 1976 Cianciulli was elected to the Pennsylvania Legislature (Pet. App. A3).

ARGUMENT

1. The government called Joseph Migatz, Administrator of the Voter Registration Division in the City of Philadelphia. In addition to explaining the ordinary procedure for voter registration in Philadelphia and identifying certain documentary evidence, Migatz testified generally, without objection, concerning the qualifications for voter registration. According to Migatz, to be eligible to register to vote a person must be a citizen of the United States, be 18 years of age, and live in the district at least 30 days before the election at his "address of residency" (1 Tr. 54). Registrants are required to provide this information demon-

strating their eligibility to register under oath (1 Tr. 61–62). On cross-examination, Migatz indicated that he understood the law to require that a registrant "actually live in a residence in order to vote from there" (1 Tr. 101; see *id.* at 103, 104). But Migatz agreed that there were exceptions to the general rule, as in the case of the provisions allowing for "absentee bailot[s]" (1 Tr. 102).[2] On redirect examination, Migatz testified that when he used the term "residency," he meant "where a person lives, where he physically lives" (1 Tr. 128). There was no objection from any of the defense counsel, but the court interrupted, stating:

> Residency has a plain meaning. It is not a technical meaning. It is a plain or common word that most lay persons know about and it's on the form and we'll have to measure a registrant's intent by the sum total of the form and what it says, and with all due respect to Mr. Migatz, his undisclosed belief of what [residency] means isn't relevant in this case.

1 Tr. 128. Even after this statement, none of the defense counsel moved to have Migatz's answer striken. Nor did any of the defense counsel seek any cautionary instruction to the jury.

During the defense case, Ricca called Michael McAllister, a practicing attorney since 1974 and a deputy assistant to one of the voting commissioners on the county board of election (7 Tr. 144).[3] Ricca hoped to establish through this witness that he had sufficient

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[2] Although it is not entirely clear, defense counsel's reference to "absentee ballots" was apparently intended to suggest that an individual could be legitimately registered in a district even though he was not physically present and therefore would have to vote by absentee ballot.

[3] Contrary to petitioners' assertion (Pet. 7), McAllister was not the "solicitor and Deputy Commissioner to the Philadelphia Voting Commission" (see 7 Tr. 144, 150).

connection with the address listed on his voter registration form to have it considered as his "residence" (7 Tr. 146–147). The court ruled that McAllister could not give a legal definition of "residency," render an expert opinion as to whether Ricca's contact with the address sufficiently established residency, or testify as to published definitions or decisions relating to dual residency, absent proof that they had been communicated to Ricca.[4] Petitioners contend (Pet. 6–9) that the trial court abused its discretion in restricting the defense's expert testimony.[5]

The admission of expert testimony is committed to the sound discretion of the district court, whose judgment will not be overturned absent a clear abuse of discretion. See, *e.g.*, *United States* v. *Watson*, 587

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[4] McAllister was permitted to testify, however, as to voter registration procedures. He also testified that Migatz's functions did not include residency determinations (7 Tr. 151–165).

[5] Petitioners also claim that the trial court abused its discretion in denying their request for an offer of proof prior to Migatz's testimony. Petitioners failed to raise this claim in the court of appeals, and therefore it should not be considered by this Court. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362–363 n.16 (1958). In any event, it is reasonably clear that petitioners suffered no prejudice as a result of the denial of their request. Beyond the bald assertion (Pet. 8–9) that the court's action somehow hampered their ability to cross-examine the witness, petitioners state nothing to indicate any prejudice to their rights. Migatz's testimony was primarily devoted to identifying and verifying records of his office (see 1 Tr. 56–58, 65–97). In addition, as noted above, Migatz testified generally as to the qualifications for registration (*id.* at 54; see *id.* at 56). Finally Migatz testified concerning the registration process (1 Tr. 61–63) and the procedure for challenging particular registrants (*id.* at 97–99). Given the nature of Migatz's testimony, it is apparent that any error in denying the requested "offer of proof" was harmless beyond a reasonable doubt. Petitioners listened to the testimony and were afforded adequate opportunity to cross-examine.

F.2d 365, 369 (7th Cir. 1978); *United States* v. *Brown*, 540 F.2d 1048 (10th Cir. 1976), cert. denied, 429 U.S. 1100 (1977). Where the subject of the proposed testimony relates to matters within "the field of common knowledge, experience and education of men," expert testimony is generally inadmissible. *United States* v. *Brown, supra*, 540 F.2d at 1054. The term "residence" has a plain everyday meaning with which jurors of common intelligence are as familiar as other citizens who are required to understand it for purposes of voter registration. McAllister's testimony concerning legal definitions of the term would thus have been inappropriate, since the subject is clearly within the common knowledge, experience, and education of the lay jurors.

The law of Pennsylvania defining the term residency is set out in some detail in the district court's opinion (Pet. App. A68–A70). The general rule is as follows:

> That place shall be considered the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning.

Pet. App. A68. An individual's temporary absence from his home or his temporary presence in a place do not affect "residency" for purposes of voter registration (Pet. App. A68–A70). The district court "duly instructed the jury on the above-settled principles of Pennsylvania voter registration law concerning 'residence' " (Pet App. A70).[6] Petitioners do not complain that the court's jury instructions were erroneous or incomplete.[7] Thus, whatever Migatz's and McAllister's

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[6] Migatz's testimony concerning his understanding of the term "residency" is of course fully consistent with these principles.

[7] Indeed, when McAllister's testimony was offered, Cianciulli's counsel, as "representative counsel" (7 Tr. 143), stated that McAllister would "basically" agree that an individual must

opinions as to the meaning of the term "residency" may have been, the jury was properly instructed on the concept, and there was no reversible error.[8]

Finally, as the district court noted (1 Tr. 128), "expert" testimony concerning the legal definition of the term "residency" was irrelevant to any of the issues in this case. Petitioners were charged with and convicted of aiding and abetting the knowing or willful giving of false information for the purpose of establishing eligibility for voter registration, conspiracy to violate the civil rights of the qualified voters of the first ward of the 13th division of the City of Philadelphia, and conspiracy to encourage the false registration of voters. Absent any evidence that any of the improperly registered individuals, including Ricca, or any of the defendants knew of or relied on the opinions of McAllister or others that an individual may be qualified to register in a district even if he lives elsewhere, such testimony is irrelevant to the intent of either the defendants or the registrants.

Petitioners' reliance on *United States* v. *Garvin*, 565 F.2d 519 (8th Cir. 1977), is misplaced. In *Garvin*, a defendant charged with using the mails to defraud in-

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"live" in a particular district to register as a "resident" of that district (7 Tr. 146), but apparently would be asked to testify as to certain exceptions.

[8] Petitioners also complain (Pet. 7-8) that it was unfair to permit Migatz to state his opinion as to the meaning of the term while prohibiting McAllister from similarly stating his opinion. Petitioners never objected to Migatz's general statements as to his understanding of the term residency. Indeed, the point was emphasized during cross-examination. When the government sought to elicit further testimony concerning Migatz's understanding of the term on redirect examination, the court unequivocally stated that such testimony was irrelevant to the issues in this case (see page 3, *supra*). In these circumstances, it is plain that defendants suffered no prejudice and that there was no unfairness in excluding McAllister's testimony.

surance companies by submitting false applications testified that he had accurately answered the pertinent questions as he understood them. The court of appeals held that the trial court had erroneously excluded expert testimony that was intended to show that the defendant's interpretation of the contract was correct, and which was relevant to other issues in the case as well. The court of appeals emphasized the "technical" nature of the language of the insurance contract.

Unlike the defendant in *Garvin*, petitioners did not testify that they thought it proper to encourage or assist individuals to register to vote in a district in which they had never lived. Whether Ricca was validly registered is largely immaterial in this case since he was not charged with false registration, although he is listed as one of 43 individuals who were improperly registered pursuant to the conspiracies charged in Counts 1 and 49 (Pet. App. A14 n.9). Nor is there any evidence to show that the individuals alleged to have been falsely registered believed that any of the "temporary absence" exceptions were applicable to them, although some testified that they did not know that their actions were illegal (Pet. App. A11–A12 n.6). Thus, unlike *Garvin*, the expert testimony offered in this case was irrelevant to any issues in the case. Finally, petitioners apparently concede that the court's instructions on the meaning of the term "residence" were accurate and complete. Petitioners therefore could have suffered no prejudice as a result of either the admission of Migatz's testimony or the exclusion of McAllister's testimony.[9]

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[9] Petitioners' reliance on *United States* v. *Dellinger*, 472 F.2d 340, 382–385 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), is also misplaced. In *Dellinger*, the defendants were charged with inciting a riot. The defense theory was that the riot was caused by the improper crowd control procedures used by the police rather than by the speeches of the defendants. The court

2. Petitioners contend (Pet. 9–10) that the district court's resolution of the issues raised by an improper communication to one of the alternate jurors by a relative of one of their co-defendants violated their rights to due process.

As described in the district court opinion (Pet. App A77–A84), the facts of this case provide no basis for this contention. On Friday, September 14, 1979, the second full day of trial, a man approached one of the alternate jurors, asked her name and where she lived, and then offered to drive her home. She declined the offer. On the following Monday, the juror told her fellow jurors about the incident and, on their advice, informed the court. The next day, the juror identified the man who had approached her to the court deputy clerk. Agents of the Federal Bureau of Investigation questioned the man and learned that he was the brother of one of petitioners' co-defendants.

When the trial judge learned the identity of the man, he informed petitioners and their counsel. Then, in the presence of counsel, the court examined the juror who had been approached as well as the other jurors in an effort to determine whether the incident would affect the jury's deliberations in any way. None of the jurors knew the man's name or whether he was associated with the government or the defense. All of the jurors testified, under oath, that they had not been prejudiced against any of the parties by the incident and that they would decide the case impartially and solely on the evidence presented (5 Tr. 86–133; 6 Tr. 3–9). On the basis of its examination, the court concluded (Pet App. A81) "that there was no prejudice to

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of appeals held that the trial judge had erred in excluding expert testimony concerning proper crowd control technique and the likely reaction of a crowd to improper technique, both matters beyond the ordinary experience of the average juror and relevant to the issues in the case.

any defendant because of the juror's contact." Thus, petitioners' reliance on *Remmer* v. *United States*, 347 U.S. 227 (1954), is wholly misplaced.[10]

Equally insubstantial is petitioners' suggestion (Pet. 9) that the trial judge's failure to inform them of the incident until after he learned the identity of the man who had approached the alternate juror and the alternate had been seated as a member of the panel was prejudicial. As the district court observed (Pet. App. A80), "[t]he defendants were informed of the incident as soon as the outsider was identified so that a meaningful inquiry could be initiated." When the judge first learned of the incident, the other jurors already knew. Thus, there was no immediate need to inform defense counsel to prevent the alternate from telling the other jurors. There was nothing to be done until the man could be identified and a "meaningful inquiry" conducted. Even if it would have been better practice to have informed counsel of the incident before the alternate was seated as a regular juror, the trial court's delay in this case was harmless. Cf. *United States* v. *Mitchell*, 590 F.2d 816, 817 (6th Cir. 1979); *United States* v. *Doe*, 513 F.2d 709 (1st Cir. 1975).

3. Finally, petitioners contend (Pet. 10–11) that the government improperly commented on their failure to testify. The district court rejected this claim in a thor-

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[10] In *Remmer* this Court held that a district court could not determine *ex parte* whether improper communications with a juror were prejudicial. 347 U.S. at 229–230. This Court's subsequent decision in *Remmer* v. *United States*, 350 U.S. 377 (1956), also does not suggest that the district court's resolution of the issues in this case was an abuse of discretion. Unlike the facts in *Remmer*, here the jurors did not know whether the man was associated with any of the defendants or the government. Nor did the alternate juror have any reason to think that she was under investigation by the FBI or that the outcome of the case could lead to such an investigation.

ough and well-reasoned opinion upon which we rely (Pet. App. A7–A54). The prosecutor's statement in rebuttal summation that certain evidence was "uncontradicted" was, as the court found, neither directed at nor understood to relate to petitioners' failure to testify. Rather, it was addressed to their failure to present other potential witnesses and was a fair response to defense counsel's challenges in their closing arguments. In the second allegedly impermissible statement, also made in closing argument on rebuttal, the government responded to arguments that certain immunized witnesses had received favorable treatment by suggesting that those individuals received benefits because they cooperated, in contrast to the defendants' persistent "stonewalling" (8 Tr. 14). The district court found that this argument was intended to respond to defense suggestions of prosecutorial unfairness, and that in context it could not have been interpreted as a comment on petitioners' failure to testify.[11] Finally, in light of the court's careful jury instructions on a defendant's right not to testify and the burden of proof, as well as the jury acquittal of one non-testifying defendant on all charges and the acquittal of petitioners on several counts, it is clear that no prejudice resulted from the two brief and unemphasized remarks.

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[11] Even if it was understood as a comment on certain defendants' failure to testify, in context it could only have related to the four co-defendants who were specifically mentioned immediately thereafter, and not to petitioners (8 Tr. 14–15).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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